## UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WILLIAM REIGEL,

Appellant

-vs
SECURITIES and EXCHANGE
COMMISSION,

Respondent.

#### APPELLANT'S REPLY BRIEF

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BERNARD I. SEGAL 5670 Wilshire Blvd., Ste. 1690 Los Angeles, California Attorney for Appellant



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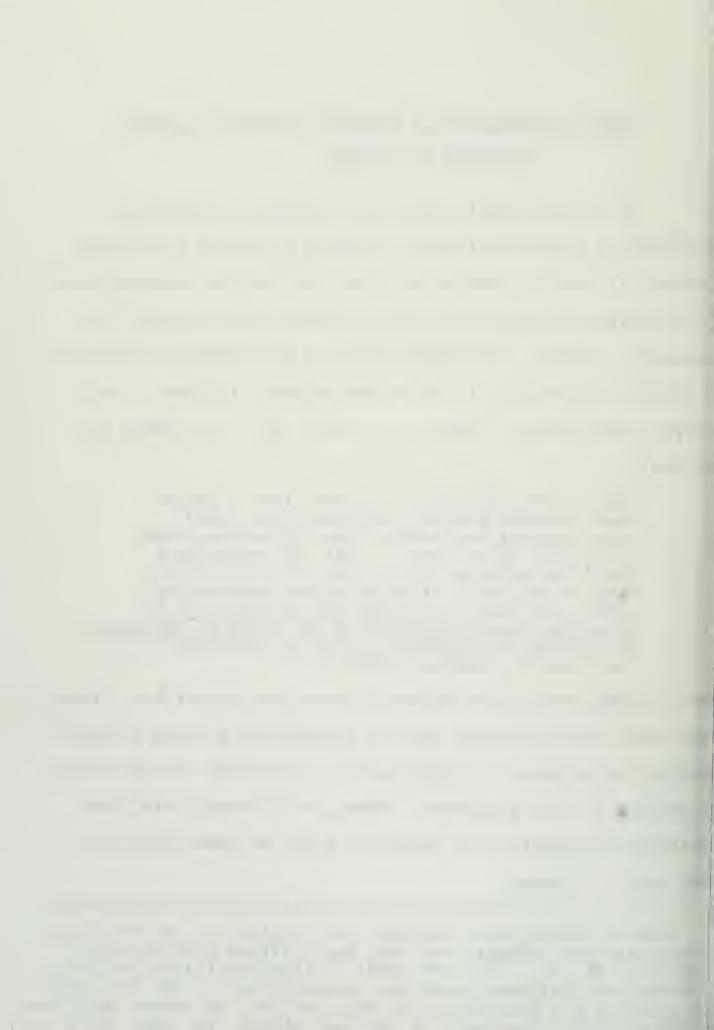
# REPLY TO COMMISSION'S COUNTERSTATEMENT OF ISSUES PRESENTED FOR REVIEW

It is not Reigel's purpose to argue the merits of espondent's counterstatement of issues presented for review, owever, it must be pointed out that the counterstatement does ot accurately reflect the issues presented for review. The espondent presents, as established an issue which in fact is n dispute and which will be argued before this Court. For xample, Respondent's issue No. 1 (Resp. Br. p. 1) reads as ollows:

"Was there substantial evidence that a securities salesman wilfully violated Anti-fraud provisions of the Federal Securities Laws when the record shows that ....(B) He predicted a rapid, substantial price rise for those securities on the basis of negotiations between the issuer and others, when he had no reason to believe the negotiations would result in an agreement, or whether the agreement would be profitable for the issuer?" (Emphasis added.)

there is evidence in the record to show that Reigel had a reasonlible basis for his belief that an agreement was being reached. The evidence is sufficient is a question for this Court o decide, but the Respondent cannot avoid having this Court onsider that question by taking as given an issue which is ery much in dispute.

<sup>/</sup> Duke Goldstone testified that the acquisition of the film ights was very probable and that negotiations were actually ompleted. (R. 497, 498, 499, 500). Colton testified that the alesmen were informed about the negotiations. He was not asked ow detailed the information he received was, he stated only that e did not tell them that the deal was closed. (R. 444, 445.)



A similar tactic is displayed by the Respondent when asks in Issue No. 3(a) whether "the order is subject to relew because prior to the hearing the recollection of witnesses gainst the Respondent had been refreshed by accurate memoranda their prior statements." (Emphasis added). There is no evidence in the record which would indicate whether or not the emoranda in question were or were not accurate. (See Reigel's iscussion of this point on page 8 to 9, (infra).

#### II

REPLY TO COMMISSION'S ASSERTION THAT THE COMMISSION DID NOT DRAW AN ADVERSE INFERENCE FROM REIGEL'S FAILURE TO TESTIFY.

The Commission evidently believed that by stating in its pinion that it was not relying on an adverse inference from eigel's failure to testify (R. 2009), it neatly avoided any othersome Constitutional issue. However, the Commission's assertion that it based its findings on an independent review of the record does not stand up on close examination, because any onsideration by the Commission of the Hearing Examiner's findings fortiori also took into consideration all of the factors, including the inference that led the Hearing Examiner to make is stated findings. Furthermore, findings of the Hearing Examiner are necessarily a part of the record, and the Commission

2



must give due weight to them. That those findings were greatly influenced by the improper inference is shown by the learing Examiner's evaluation of the testimony given by the only two witnesses offered by the Division to prove Reigel's alleged misrepresentation. In crediting that testimony the learing Examiner stated:

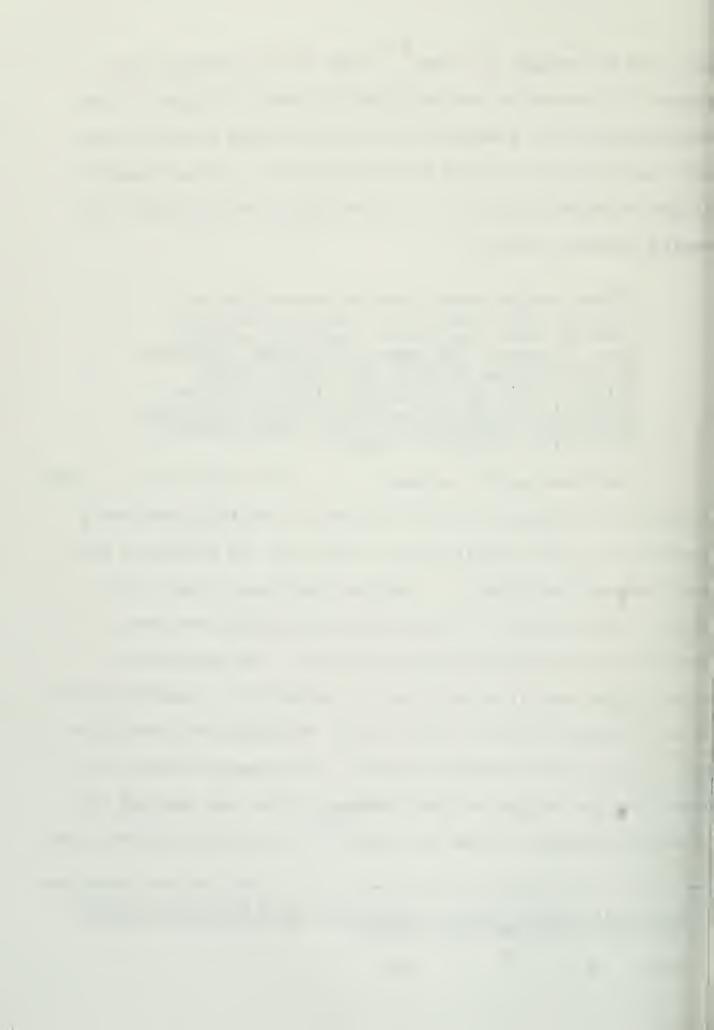
"After having heard these witnesses and observing their demeanor the Hearing Examiner credits their testimony. Moreover, neither Cook, Pambrun, Fleischman nor Reigel testified at the hearing in their own behalf. Their failure to do so is deemed a factor of substantial significance, warranting the inference that their testimony would have been adverse."

(R. 1691). (Emphasis added).

The Commission's argument is to the effect that it could disregard an inference which affected the Hearing Examiner's findings as to the credibility of the only two witnesses who testified against Reigel. But the Commission cannot know whether the testimony of those witnesses would have been credited but for the improper inference. The Commission certainly was not in a position to evaluate the credibility of these witnesses from the cold record. Although the Commission need not hear the witnesses testify, the Commission must at least give due weight to the findings of the one who did observe the demeanor of the witnesses. But in the instant case,

<sup>2/ &</sup>lt;u>Universal Camera Corp. v. National Labor Relations Board</u>, 340 U.S. 474, 493 496, 497 (1951).

<sup>}/</sup> Ibid.



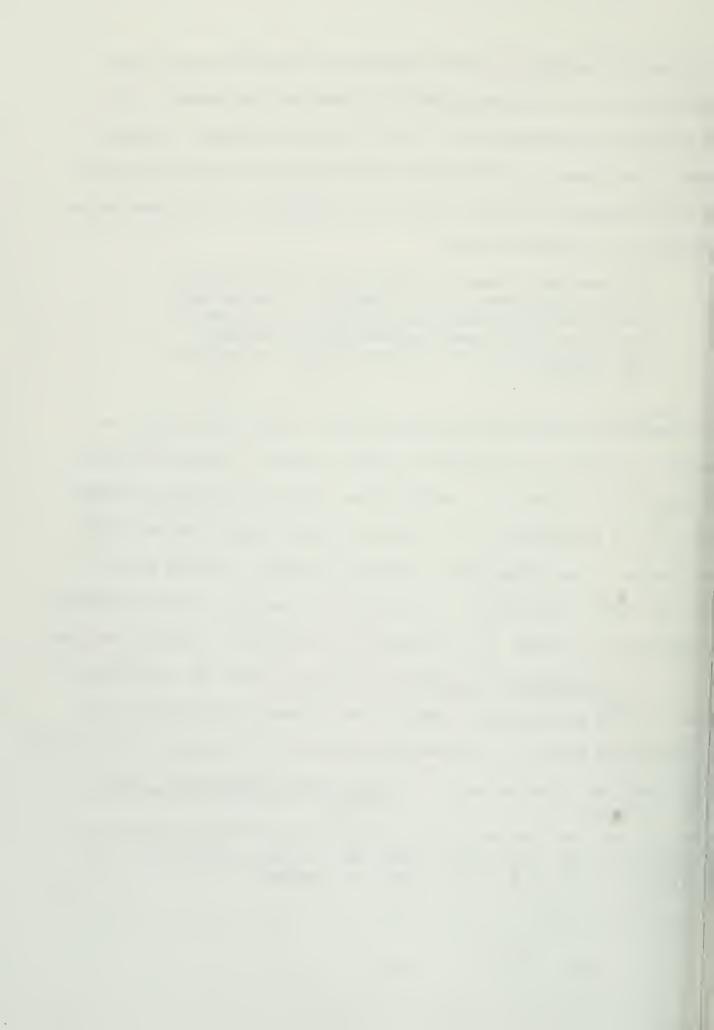
co give due weight to those findings, would mean that the commission had not disregarded the improper inference, but ad actually incorporated it into its own findings. Indeed, here is evidence in the Commission's Opinion itself that it id not disregard Reigel's failure to testify. The Commission seerts in its Opinion that:

"Respondents have no knowledge of the terms of any agreement with Goldwyn, or the nature and quality of the film library, or of any of the other pertinent considerations making for the success or failure of such a venture." (R. 2004).

Lusion. Unless the Commission has inferred from the failure Reigel and others to testify that they had no such information, it is difficult to see how the Commission reached this conclusion. The Commission certainly cannot contend that it does not have the burden of proving its charges, but can shift or Reigel the burden of proving that he did not violate the law.

Strathmore Sec. Inc. v. S.E.C. cited by the Commision for the proposition that it can properly disregard such
inference drawn by the Hearing Examiner is clearly distinguishble from the case at bar. In Strathmore Securities, Inc. v.

<sup>/ (</sup>Resp. Br. p. 23) C.C.H. Fed. Sec. L. Rep., Par. 92, 335 t 97,605 n. 2 (C.A. D.C., Jan. 24, 1969).



SEC, the Hearing Examiner "stated clearly that his findings did not need the support of the inference." Therefore, in Strathmore, the Commission had not been presented with a record in which the findings with regard to the credibility of witnesses was incurably tainted by an unconstitutional inference. Nevertheless, the Court in Strathmore, citing Spevak v. Klein, stressed the seriousness of the Constitutional question presented, but concluded that it was not necessary to decide the issue due to the fact that both the Hearing Examiner and the Commission 7/stated that their findings did not rely on the inference.

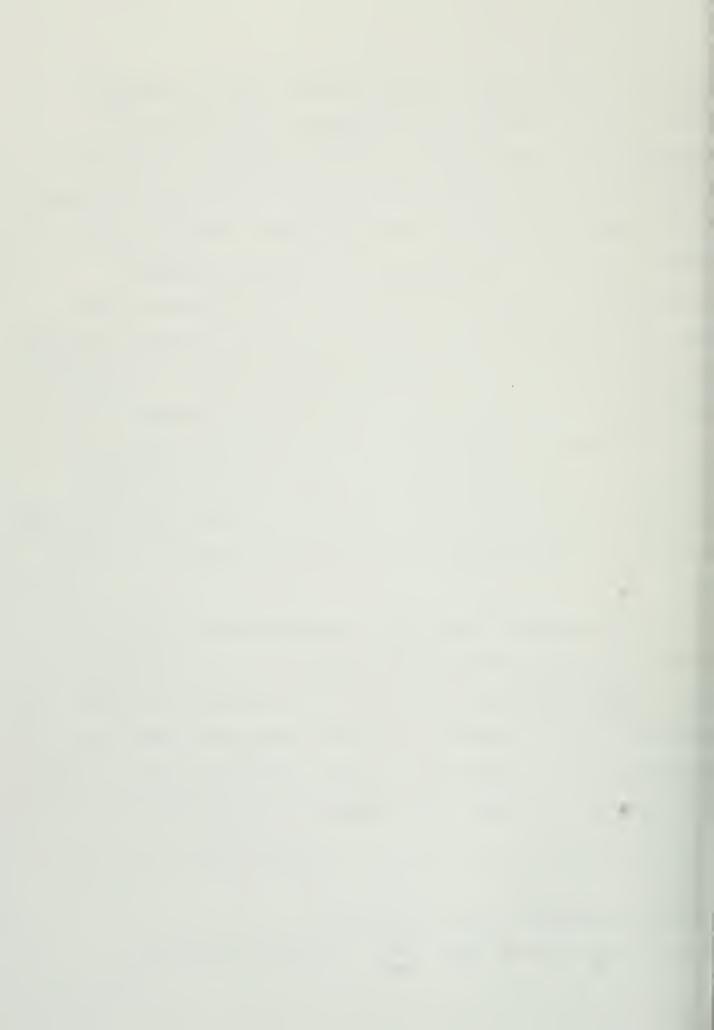
Contrary to the argument presented by the Commission (Resp. Br. p. 24) Colton clearly expressed the views of those individuals who did not wish to testify, including Reigel, (R.518). Whether or not the statement by Colton was completed is irrelevant.

The Commission argues that although Reigel was not represented by an attorney at the Hearing, he was represented prior to the reopening of the record for testimony by another espondent, and that Reigel's attorney should have urged the learing Examiner to decide the reserved question so that he could letermine whether Reigel should take the stand. (Resp.Br. p. 24-25).

<sup>/</sup> Ibid.

<sup>/</sup> Spevak v. Klein, 385 U.S. 511 (1967)

<sup>/</sup> C.C.H. Fed. Sec. L. Rep., Par. 92, 335 at 97,605 n.2.



ne Commission's argument in this regard is particularly consising since they cite a portion of the record which shows that eigel's attorney did urge the Hearing Examiner to decide this pint. (R. 610, 611). Furthermore, the Commission must be ware that the re-opened hearing was expressly limited to the urpose of hearing the testimony of Nees, and allowing Nees to coss-examine the witnesses who testified against him. It should be further noted that Reigel's attorney did request that the receedings be broadened to cover evidence introduced at the rior hearing, and that the Hearing Examiner rejected this equest. (R. 551-555).

#### III

REPLY TO COMMISSION'S ASSERTION THAT THE COMMISSION DID NOT RELY UPON HEARSAY EVIDENCE.

In order to refute Appellant's argument that the Commission relied upon incompetent hearsay evidence in concluding that Reigel had no reasonable basis for representations made him, the Respondent now asserts that the Commission made no findings with regard to whether there was actually a "deal" between Jayark Films and Goldwyn. (Resp. Br. p. 25). Respondents firther argue that the finding that Reigel had no adequate basis fir his representations was based in part upon a conclusion that "Respondents had no knowledge of the terms of any agreement with Gldwyn, or the nature and quality of the film library, or of any other pertinent considerations making for the success or

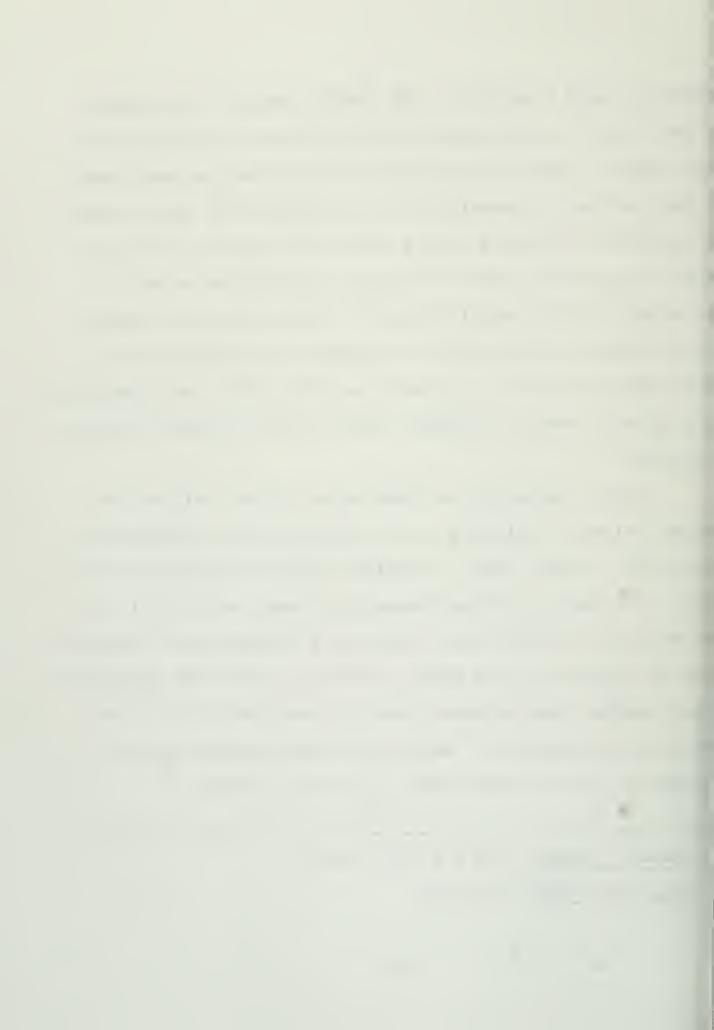


failure of such a venture'". (R. 2004). However, no evidence in the record to substantiate that conclusion is cited or in fact exists. None of the witnesses at the Hearing were asked if they had this information, and the Commission surely cannot be justified in drawing such a conclusion from the failure of Reigel to take the stand and testify as to his knowledge of the details of the negotiations. Indeed, the only explanation for such a conclusion on the part of the Commission is that, contrary to their protestations (R. 2009), the Commission did, in fact, draw an improper inference from Reigel's failure to testify.

After contending the Commission did not rely on the hearsay evidence contained in the Slaff letter, the Commission states that "in any event, technical rules of evidence do not apply in an Administrative Proceeding" (Resp. Br. p. 26). As the Respondents pointed out, Reigel has conceded that technical rules of evidence do not apply. However, surely the Respondent annot contend that evidence should be admitted if it is not the sort of evidence on which responsible persons are actustomed to rely in the conduct of serious affairs."

\_/ Spevak v. Klein, 385 U.S. 511 (1967).

Cal. Govt. Code, 11513(c).



As pointed out in Appellant's Opening Brief (p. 26-27) due o the obvious prejudice of Goldwyn's attorney, the author of he hearsay evidence in question, there is a serious question s to whether the evidence in question would even meet that equirement.

REPLY TO COMMISSION'S ASSERTION THAT THERE WAS NOTHING IMPROPER OR PREJUDICIAL IN REFRESHING THE RECOLLECTION OF INVESTOR-WITNESSES BY SHOW-ING THEM MEMORANDA OF PRIOR INTERVIEWS.

The Commission asserts that the memorandum of interviews hich were used to refresh the memory of witnesses were "highly ccurate" (Resp. Br. p. 26), and cites the statements of two itnesses who made that evaluation more than a year after the nterviews in question. (R. 290, 316). It should be noted that either of the witnesses who made the statements referred to ere part of the case against the Appellant herein, so that heir evaluations can have no relevance to the accuracy of the writings used to refresh the memory of witnesses who testified against Reigel. The Commission further states that Espondents were aware of the refreshing techniques while the witnesses were on the stand (Resp. Br. p. 26); no citation to te record is offered for this proposition and the record itself cearly refutes this argument since all references in the Transripts to this refreshing technique occur after the testimony



of the witnesses who testified against Reigel.  $\frac{10}{}$ 

Furthermore, it is irrelevant that "no claim is made that the investigators did anything more than simply ask questions at the original interview." (Resp.Br.p.26). What Reigel is objecting to is the fact that the witnesses had their memories refreshed by memorandums prepared by the Division, not by the witnesses. The extent to which such memorandums were phrased by Mr. Hiller instead of by the witnesses could have been the difference between an alleged misrepresentation and an innocent representation. This point is buttressed by the fact that an investigator, such as Mr. Hiller, is inevitably going to include in such memorandums statements which tend to show violations of the law, and not statements which would tend to exculpate the illeged offender. Since Reigel was not represented by counsel ne was not aware of his right to examine and cross-examine with respect to such writings. California law, at the time of the hearing, would not have allowed this refreshing technique. ode of Civil Procedure Section 2047 established

<sup>0/ (</sup>R. 530, 531) Investigator Hiller testimony, (R. 299,360) testimony of two witnesses regarding accuracy of memorandums, R. 138-164) testimony of witnesses presented against Reigel.

Respondent cites page 365 of the Record for the proposition that an examination of one of the memoranda was permitted.

owever, page 365 makes no reference to such an occurrence.

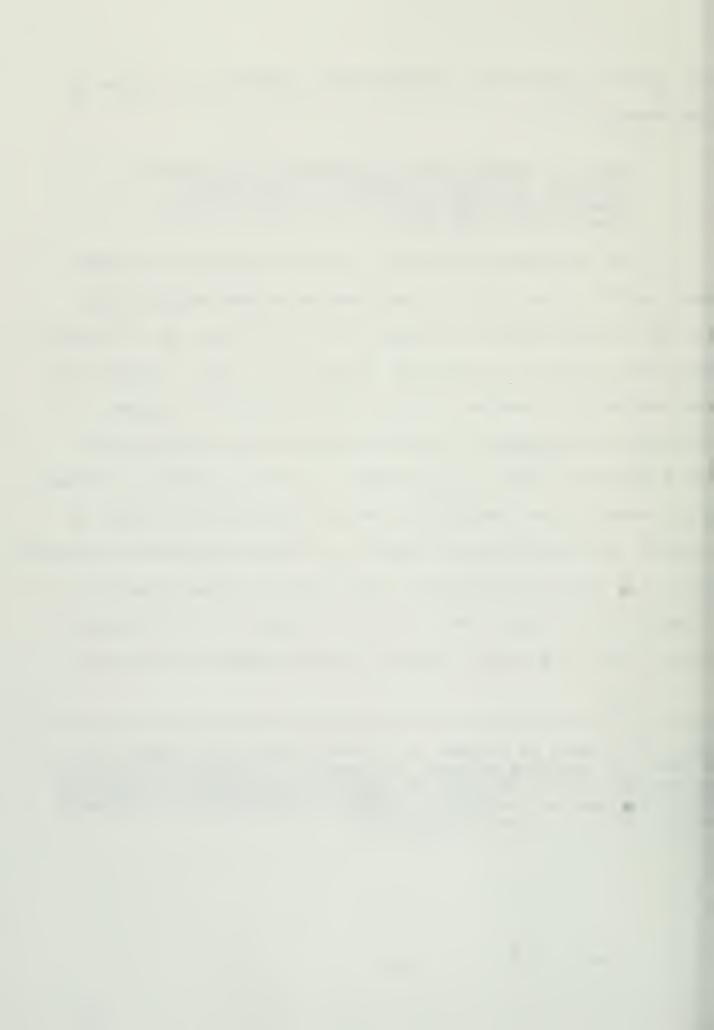


the proper evidentiary standard to be applied at the time of  $\frac{11}{}$  the hearing.

REPLY TO COMMISSION'S ASSERTION THAT REIGEL'S ELECTION TO FOREGO COUNSEL AT THE INITIAL HEARING PROVIDES NO BASIS FOR ATTACK ON THE COMMISSION'S DECISION.

It is clearly irrelevant for the Commission to point out the "it is no fault of the Commission that Reigel chose not to be represented by counsel" or that "there is no requirement that counsel be provided" (Resp. Br. p. 28). Reigel has not contended otherwise. It is clearly relevant, however, in assessing the impact of the other procedural infirmities of the Hearing to take note of Reigel's lack of counsel. Interestingly enough, the Commission does not dispute that a lack of counsel would multiply the impact of other procedural irregularities, but merely asserts that there were no other procedural irregularities (Resp. Br. p. 28). Of course, that determination is for this court, and not for the Commission to make.

<sup>11/ &</sup>quot;A witness is allowed to refresh his memory respecting a fact, by anything written by himself, or under his direction at the time when the fact was fresh in his memory and he knew that the same was correctly stated in the writing." (Emphasis added) C.C.P. § 2047 (repealed).



asserting that the attorney subsequently retained by Reigel as only recently decided that these infirmities exist". (Resp. p. 28). The record clearly shows that Reigel's attorney raised lese issues before the Hearing Examiner upon his first opportunity do so, which was prior to the re-opened hearing, and prior to be Initial Decision; these issues were raised in the "Opposition Proposed Findings, Conclusions and Brief on Behalf of the vision of Trading and Markets, and Proposed Findings, Conclusions and Brief on Behalf of Respondents, William Reigel, Pierre Pambrun de Jay B. Cook" dated Dec. 20, 1965. Reigel's attorney again ised these issues at the re-opened hearing.

The Commission argues blatantly contrary to the fact

Even assuming that the Respondent is correct that the  $\frac{14}{}$  learning Examiner made it clear that he would not admit the

<sup>/</sup> PP. 66-67, introduction of incompetent hearsay evidence; 70-72, improper education of witnesses; pp. 68-70, introduction of irrelevant prejudicial evidence which induced Reigel to testify; pp 62-63, opposition to Division's argument that afterence of guilt should be drawn from failure to testify.

R. 611, 612, objected to education of witnesses; R. 610, equested ruling on introduction of irrelevant prejudicial evience, R. 560, objected to incompetent hearsay evidence; since hearing Examiner had not yet indicated that he had drawn improper inference, Reigel's attorney could not have raised he issue at the re-opened hearing.

<sup>/</sup> The actual language used by the Hearing Examiner is somewhat abiguous and would be particularly so to a layman. (R. 469-470).



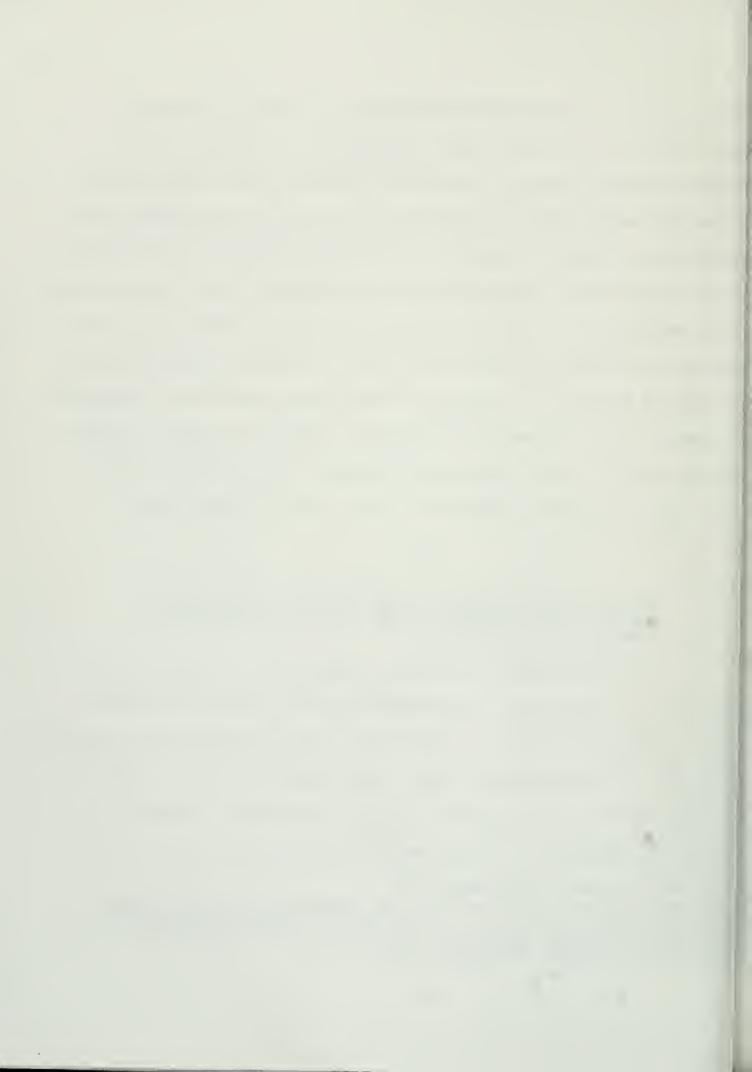
desp. Br. p. 29, n. 35), this would have no bearing on the lemma faced by Reigel. The Hearing Examiner had stated that thought the evidence was proper (R. 469-70), and Reigel could extainly not read the mind of the Hearing Examiner and determine hat he would later change his mind and conclude that the evidence is inadmissible. The failure by the Hearing Examiner to rule hen and there that the Division's line of questioning was irrelement placed Reigel in a position where if he testified it amounted to a gamble upon the Hearing Examiner's ultimate ruling upon the eserved point. This did not give Reigel a free choice in the latter and was highly prejudicial. (App. Op. Br. pp. 14-16)

VI.

REPLY TO COMMISSION'S ASSERTION THAT THE REMEDIAL ACTION TAKEN AGAINST REIGEL WAS WELL WITHIN THE COMMISSION'S DISCRETION.

The Respondent has not even attempted to reply to opellant's argument that the Commission must apply reasonable andards in determining the sanctions to be imposed upon alleged iolators of the Securities Laws. The Appellant has not disputed not the Commission has power to alter the penalty imposed by the Hearing Examiner, so the cases cited for this proposition by the Commission are irrelevant.  $\frac{15}{}$ 

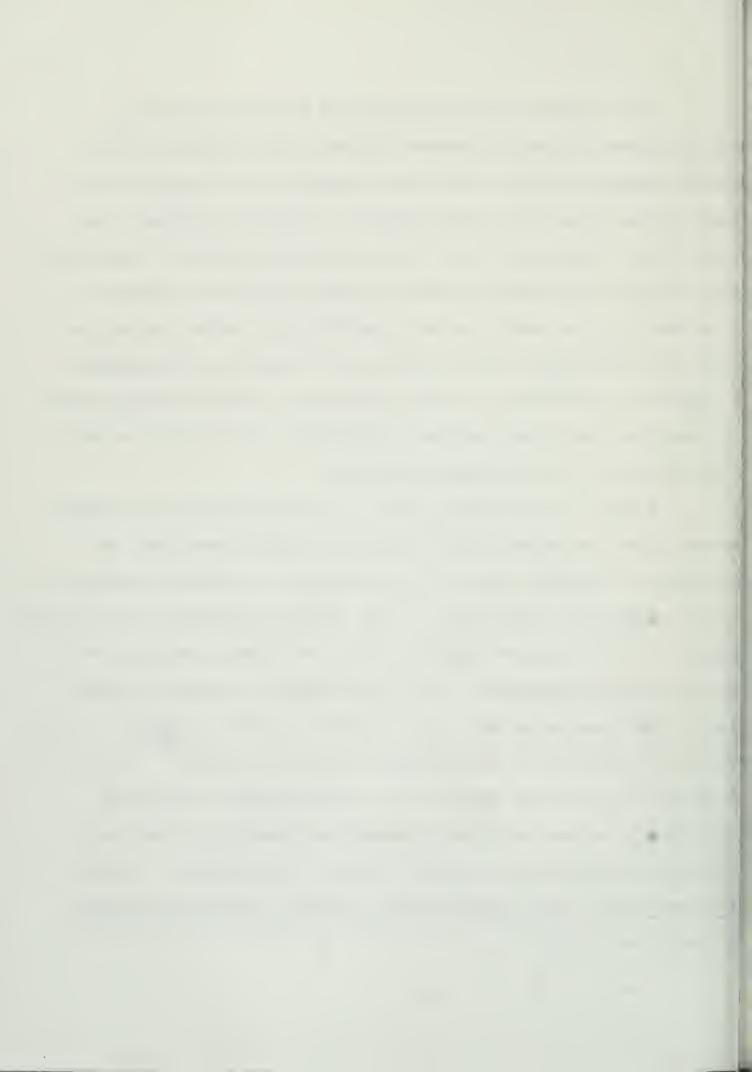
<sup>/ (</sup>Respondent's Brief pp. 22, 30) Pierce v. Securities and change Commission, 239 F. 2d 160 (C.A. 9, 1956); Resp. Br. p. 31; n Francisco Mining Exchange v. SEC, 378 F. 2d 162, (C.A.9, 1967).



The argument made by Reigel has been, and still is, hat the great disparity between the sanctions imposed by the earing Examiner and the sanctions imposed by the Commission inicate either that the record failed to reflect accurately the enor of the testimony, due to the numerous procedural irregularities, or that the Commission did not apply rational standards in determining the penalties which prohibited conduct calls for. The urely the Commission cannot contend that they are not required to adhere to standards, but can arbitrarily and capriciously mete ut sanctions which can deprive individuals of the right to earn a livelihood in their chosen profession.

Reigel is not arguing that his penalty should be reduced ecause other individuals have received lighter penalties, so espondent's argument that it is irrelevant to compare remedies is tself irrelevant. (Resp. Br. p. 33). Reigel is arguing that the Comission, in deciding the remedies which an offense warrants, must pply reasonable standards. To avoid Reigel's position in this egard, the Commission has again offered the stale argument hat the provisions of the Exchange Act are not penal. It is ecoming more and more apparent that disciplinary proceedings ubjecting a person to license revocation demand the same contitutional safeguards as would a criminal proceeding. Recent ases recognize that constitutionally objectionable procedures

6/ Resp. Br. p. 32.



eannot be hidden under the cloak of "remedial measures for  $\frac{17}{}$  he public interest."

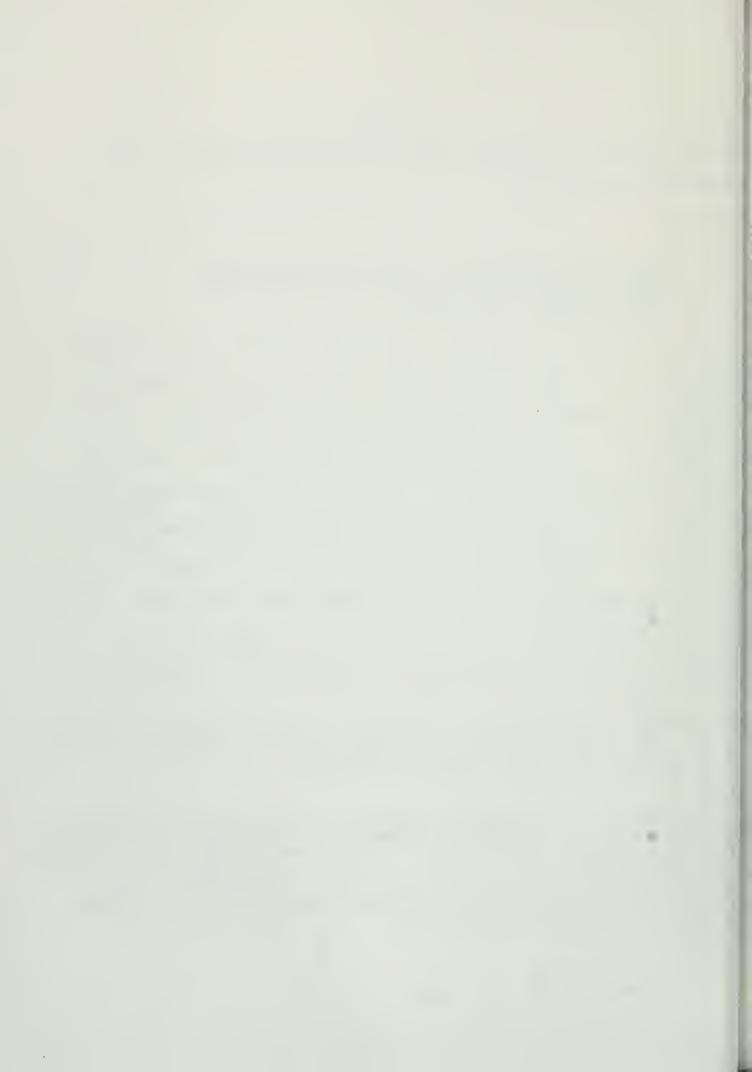
VII.

REPLY TO RESPONDENT'S ASSERTION THAT REIGEL PARTICIPATED IN THE PUBLIC DISTRIBUTION OF UNREGISTERED JAYARK STOCK.

The Respondent admits that Reigel did not sell unregistered securities (Resp. Br. p. 17). However, in an attempt to crown this admitted fact, it is argued that Reigel "aided and abetted" in the sale of unregistered securities. (Resp. Br. 18). Respondent's argument in support of this belatedly asserted coposition is incorrect for several reasons, (discussed infra), but the least of which was that Reigel was never charged with adding and abetting in the sale of unregistered securities. The order for Proceedings does not charge that Reigel aided and the operation in the sale of unregistered securities. Neither the

<sup>7/</sup> Garrity v. New Jersey, 385 U.S. 493 (1967); Spevak v. Klein, 35 U.S. 511 (1967); Shively v. Stewart, 65 Cal.2d 475, 421 P.2d 65 (1966); Elder v. Bd of Medical Examiners, 241 CA 2d 246; Cal. Rptr. 304 (1966)

R. 128-132). The pertinent part of the Order for Proceeding as: "directly and indirectly, offered to sell, sold and delivered fter sale, certain securities ...." The word "indirectly" appears the Act only with reference to the use of the mails and intertate commerce, and therefore could not be interpreted as prolibiting "aiding and abetting". Securities Act of 1933, §5(a) and (c), 15 U.S.C. 77e (a) and (c).



earing Examiner in his Initial Decision, (R. 1667-1705), nor the mmission in its Opinion (R2000-2011) found that Reigel had aided d abetted in the sale of unregistered securities. Indeed, neither e Division nor the Commission has ever argued in their Briefs at Reigel aided and abetted in the sale of unregistered securi-In its "Proposed Findings, Conclusions and Brief" dated es. tober 7, 1965, the Division referred to Reigel as "activist in fecting the purchase for Registrant" (p. 7). However, Reigel s not charged with being an activist in effecting the purchase the unregistered shares, for the very simple reason that the atute which he was accused of violating prohibits the selling, fering to sell and delivery after sale of unregistered securities. curities Act of 1933 Sec. 5(a) and (c), 15 U.S.C. 77e (a) and (c). e Hearing Examiner avoided the problem altogether by discussing ly whether Reigel should have known that the shares should have en registered, and by never coming to grips with the question of ether Reigel in fact sold, offered to sell or delivered unregis-

The Commission in its Opinion skirted the issue by finding at Reigel "participated in the sale of unregistered securities."

wever, Reigel was not charged and could not have been charged the "participating in the sale of unregistered securities", because the statute which he was accused of violating required that "sold", "offered to sell" or "delivered" unregistered securities. Ecurities Act of 1933, §5(a) and (c), 15 USC 77e (a) to (c).

red shares (R. 1675).



nus, both the "activist" label by the Division and the "particiated" label of the Commission are words used to cloak a fatal mission in the pleading -- to wit, that Reigel was not charged ith "aiding and abetting".

It is important to note that the Commission, for the

irst time in these lengthy proceedings, has argued that Reigel ided and abetted the sale of unregistered securities, completely gnoring the fact that Reigel has never been so charged. It further nould be noted by way of comparison that the Commission was areful to allege in its original Order for Proceedings that eigel aided and abetted violations of other Sections of the ecurities Act, and the Exchange Act. (R. 1230, par. C, R. 1229, ar. B). There are at least two possible explanations why Reigel as not charged with aiding and abetting the violation of Section (a) and (c) of the Securities act: Firstly, there was no statutory athority for a charge of aiding and abetting until 1964, as aditted by the Division (Resp. Br. p. 18); the alleged violations pook place prior to 1964. Secondly, the activities of Reigel could not be sufficient to constitute aiding and abetting.

The Respondent attempts to avoid the fact that at the ime of the alleged offense, it was not prohibited by statute, y rather cavalierly asserting that "it is not necessary to deterine whether these provisions enacted in 1964 were intended to ave a retroactive effect: (Resp. Br. p. 18). Respondent cites or this proposition M.G. Davis & Co. v. Cohen, 256 F. Supp. 128 1966). An examination of the facts in M.G.Davis, supra, shows



learly that this case will not support a retroactive application the aiding and abetting provisions of Exchange Act Sec. 15 (b) (E), 15 U.S.C. 780 (b)(5)(E). The 1964 Amendment added several stinct provisions to the Exchange Act. One part of the Amendment ovided for bringing a suit directly against a salesman if he had mmitted an act which previously could have been the basis of a sciplinary proceeding against a broker or dealer who employed him. change Act of 1934 §15(b)(7), 15 U.S.C. 780 (b)(7). M. G. Davis, pra, dealt with this part of the amendment, and the court conuded that in M.G. Davis there was no retroactive application the statute since the offense in question had been proscribed by rlier law, and the part of the amendment involved granted only a ocedural device to sue the employee directly. However, in the se at bar we are dealing with an offense which was not previously oscribed by statute, since the section which proscribed aiding d abetting was specifically added to the law by the 1964 amendnt and prior to that time there was no statutory authority ich would have made such activity the basis of any disciplinary oceeding. Exchange Act Sec. 15 (b)(5)(E), 15 U.S.C.780 (b)(5)(E).

<sup>/</sup> The court stated at pp 134-135:

<sup>&</sup>quot;. . . since 1936 the Commission has had authority to revoke or deny a broker-dealer registration on the basis of acts or omissions of a person associated with that broker-dealer. 15 U.S.C.§780. After such a finding, the Commission is empowered to revoke the registration of any other broker-dealer who thereafter employed this person. . . . This effective, if cumbersome device for excluding wrong-doers from the securities field has simply been improved by the 1964 amendment authorizing the institution of disciplinary proceedings directly against salesmen.



Respondent goes on to argue that the Commission has long interpreted the statute as proscribing aiding and abetting violations of the Securities Act. However, the cases cited by the espondent do not support that proposition. Many of the cases ited dealt with situations in which the owners of the firm were narged with "aiding and abetting" the violations of the firm. It must be recognized that it is meaningless to contend that the owners and operators of a firm "aided and abetted" the violations of their firm; such a contention would be considered a tautology ere it not for the technical fiction that a firm is a separate antity from its owners and operators. Other cases cited by the espondent are cases which could more aptly be described as contractions, or joint ventures, and in some instances were so described,

<sup>/</sup>Resp. Br. p. 18; Batten and Co. v. SEC, 345 F. 2d 82 (C.A.D.C.1964)
Prinett v. United States, 319 F. 2d 340 (C.A. 8, 1963); Luckhurst
and Company, 40 SEC 539 (1961); William Todd, Inc. 32 SEC 537, (1951).

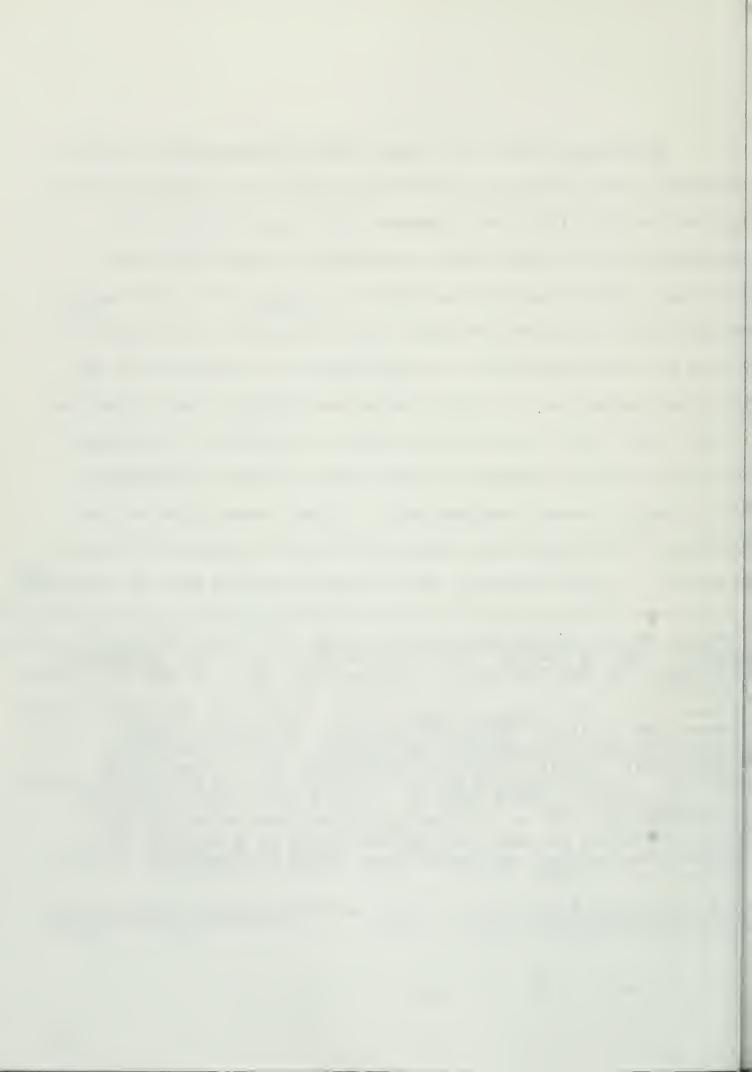
I/ Resp. Br.p. 18, Ross v. Licht, 263 F. Supp. 395, 410 (SDNY, 1967) alternative holding), Mason, Moran & Co., 35 SEC 85 (1953); rennan v. Midwestern United Life. Ins.Co., 259 F. Supp. 673, 682

D.Ind.1966); Pettit v. American Stock Exch. 217 F. Supp. 21, 28

DNY 1963); Scott Taylor & Co., 183 F. Supp. 904, 909 n.12 (SDNY 1959)

C v. Timetrust, Inc. 28 F. Supp. 34, 43 (N.D. Cal. 1939); Burley & Co., 23 SEC 461, 468, n. 11 (1946). Another case cited by the commission refers to some very unclear dicta in a footnote and herefore has not been discussed here, Henry P. Rosenfeld, 30 SEC 41, 944, n. 3 (1950).

<sup>2/</sup> Scott Taylor & Co., 183 F. Supp. at 908; Pettit v. Amer. Stock ch., 217 F. Supp. at 28.



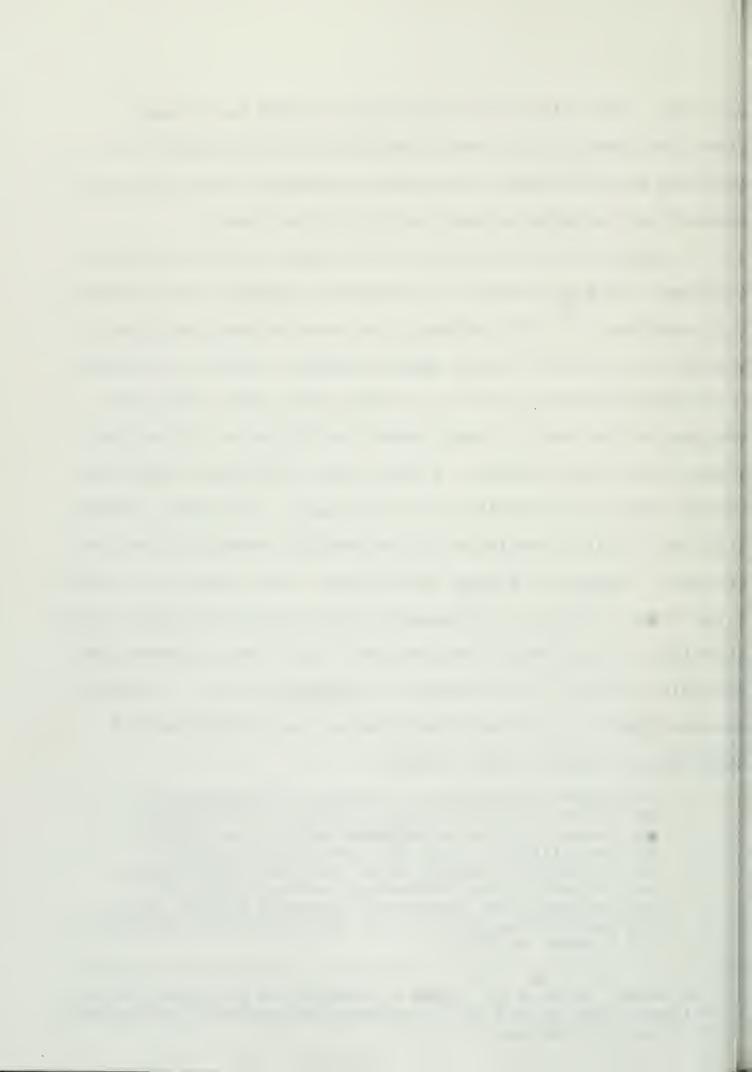
ince they dealt with fact situations in which the alleged iders and abetters were participating in the violations for heir own gain and there was evidence presented that they were ware of the unlawful purposes of the transactions.

None of the cases cited dealt with situations in which

salesman has been accused of aiding and abetting the violation  $\frac{23}{}$  This brings up the very serious question of mether the activity alleged against Reigel could be classified as aiding and abetting even if it were found that aiding and betting in the sale of unregistered securities was proscribed to the time of his actions. A very recent California case has efined aiding and abetting as to "instigate, encourage, promote or aid with guilty knowledge of the wrongful purpose of the peretrator". People v. Flores, CA 2d Crim. 15501, Feb. 14, (1969). In the cases cited by the Commission where aiding and abetting of iolations of the Securities Laws were found these elements are byiously present. For instance, in Brennan, supra, a corporation was found to have aided and abetted the violations of a roker-dealer and the Court stated:

"Defendant knowingly and purposely encouraged an artificial build-up in the market for its stock. As a result of the stimulated market, the defendant was allegedly in a more favorable position for a potential merger which was then negotiating, and certain of the defendants' officers and directors realized substantial personal profits from the sale of the stock in the defendant corporation." 259 F.Supp. at 682.

<sup>3/</sup> In Mason, Moran & Co, supra a manager was involved; there as evidence that he had full knowledge and actively participated n the fraudulent scheme.

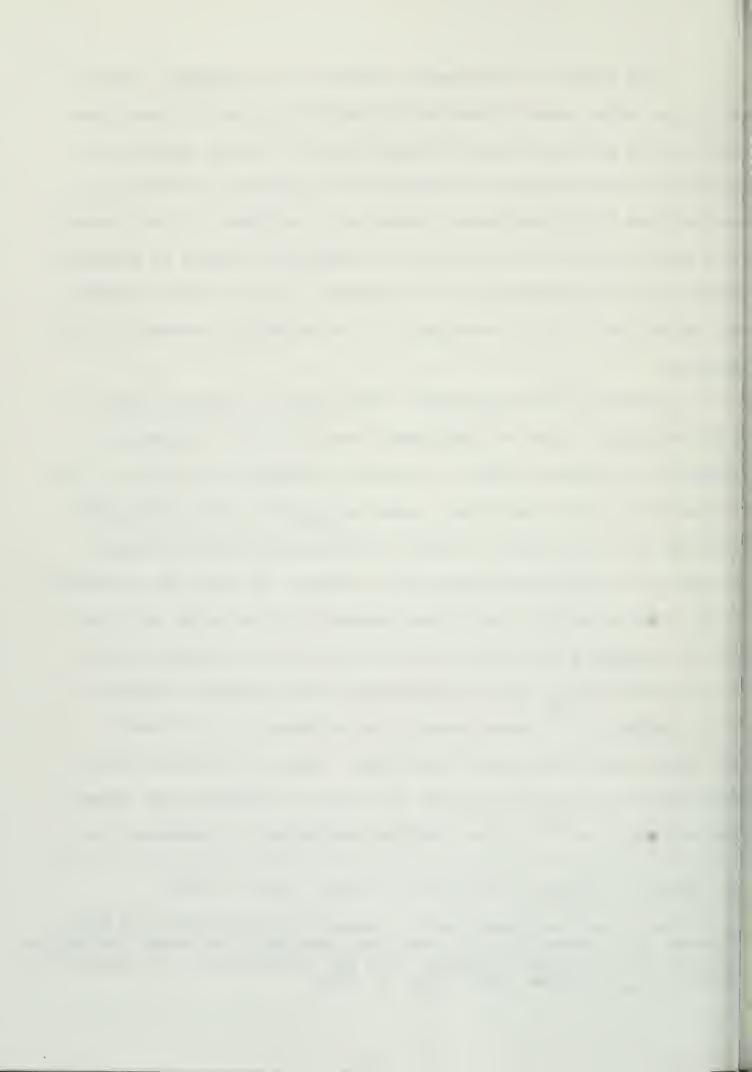


The kind of involvement referred to in <u>Brennan</u>, supra, and in the other cases cited by the Respondent are in sharp conrast to the actions taken by Reigel herein. Reigel merely aranged for the purchase of shares by his employer pursuant to instructions by his employer. There is no evidence in the record hich would indicate that Reigel had anything to gain by the conummation of the purchase by his employer, nor is there evidence that Reigel had "guilty knowledge of the wrongful purpose" of his imployer.

Although the Respondent cites cases to indicate that it is not necessary that an individual know that his actions are nlawful to establish wilful violations, (Resp. Br. p. 19, n. 25) it should be noted that these cases do not deal with aiding and betting, but are cases in which the individual has performed he specific acts proscribed by the statute, so that the elements of the offense were in each case present; but in order to establish the elements of aiding and abetting, it is necessary that he individual have "guilty knowledge of the wrongful purpose of he perpetrator". Here there is no evidence in the record hat Reigel had such guilty knowledge. There is evidence which ndicates that he believed that the stock in question was exempt  $\frac{25}{}$  since "guilty knowledge" is necessary in a

<sup>24/</sup> People v. Flores, CA 2d Crim. 15501, Feb. 14, 1969.

<sup>5/</sup> Evidence was introduced which showed that appellant had been informed in a letter from Kaufman that Kaufman's attorney had advised that the shares would be exempt from SEC registration. Division's Exhibit No. 3, letter dated Sept. 9, 1963.

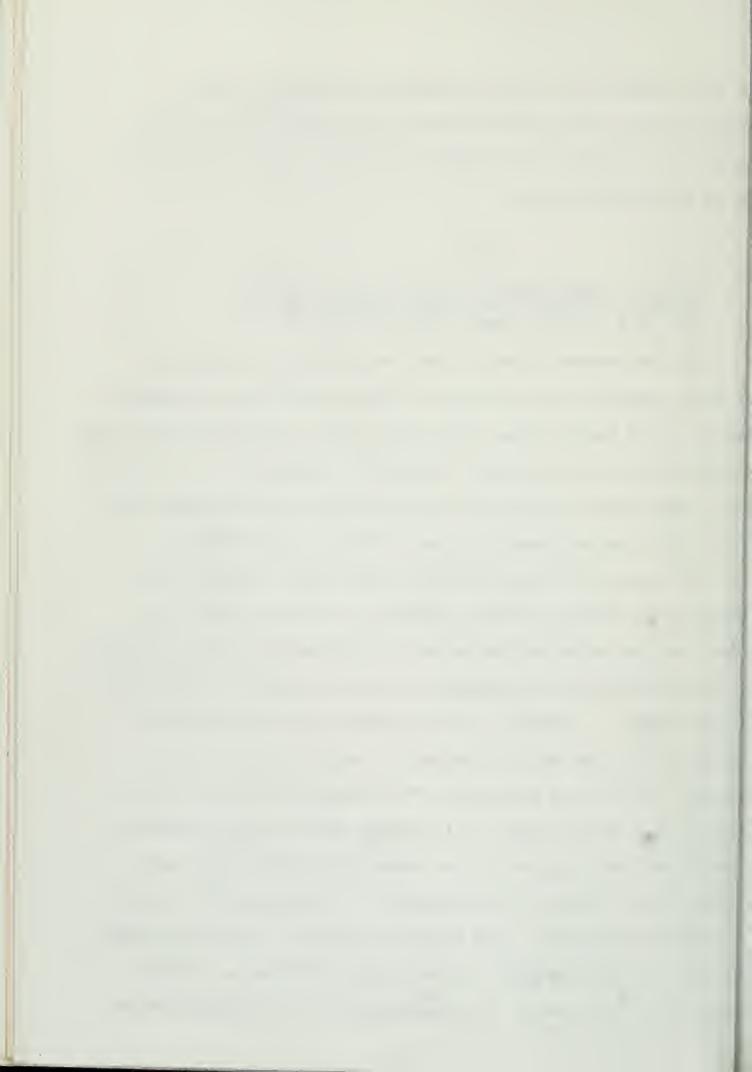


mmon law crime such as that considered in <u>Flores</u>, supra, orgery) it would seem axiomatic that such knowledge would be cessary in a technical statutory regulation, such as that in-

## VIII

REPLY TO COMMISSION'S ASSERTION THAT REIGEL WILFULLY VIOLATED ANTI-FRAUD PROVISIONS IN THE SALE OF REGISTERED JAYARK STOCK.

The Respondent asserts that the predictions made by igel with respect to the future of Jayark stock had no reasonle basis since Reigel knew very little about the prospective deal ing negotiated between Jayark and Goldwyn (Resp. Br. p. 14, 15). wever, Respondent only points in the record to a statement made Colton that the salesmen were not told that the deal was osed. Of course the deal would not have been "closed" until e papers were actually signed. However, to contend that the ct that serious negotiations were in progress was not a relevant ctor in estimating the prospects of Jayark stock is far-fetched say the least. Indeed, it is arguable that it would be a each of duty on the part of Reigel to fail to report such a gnificant fact to his customers. The Commission points to no vidence in the record where it is stated that the only informaon Reigel had with regard to the negotiations was that they ere taking place. Unless the Commission is implying that Reigel d no other information, from Reigel's failure to take the stand nd testify, it is difficult to see how the Commission reached s conclusion. Of course, the Commission has strenuously main-



earing Examiner from Reigel's failure to testify (R. 1691), it impletely excised that inference from the record in drawing its inclusions (R. 2009).

The Respondent cannot refute the admission by Mrs. B. cross-examination that the predictions made by Reigel were pressly made conditional on the acquisition of the film brary (R. 152); merely because in her prior testimony she had at indicated that those predictions had been conditioned. Mrs. B. s not asked whether Reigel's statements were conditional on rect examination. Of course, an important purpose of cross-amination is to clarify and explain testimony given on direct lich may be misleading. In this instance Mrs. B's cross-examination of the served that purpose.

The Respondent makes much of testimony in the record dicating that Reigel was not told whether the "deal was closed".

esp. Br. pp. 14, 15.) However, it must be pointed out that ere is no evidence in the record that Mr. Reigel ever told his estomers that an agreement had been consummated. It is self-rident that until an agreement is consummated, one of the parties in always refuse to agree. All that a reasonable person can do to attempt to evaluate the possibilities of final consummation king place. Mr. Goldstone's testimony indicates that the possibilities were excellent. (R. 497, 498, 499, 500).

The Respondent argues the predictions of a substantial acrease in the price of a speculative securities within a clatively short period of time are inherently fraudulent and

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ned that notwithstanding the improper inference drawn by the ring Examiner from Reigel's failure to testify (R. 1691), it pletely excised that inference from the record in drawing its clusions (R. 2009).

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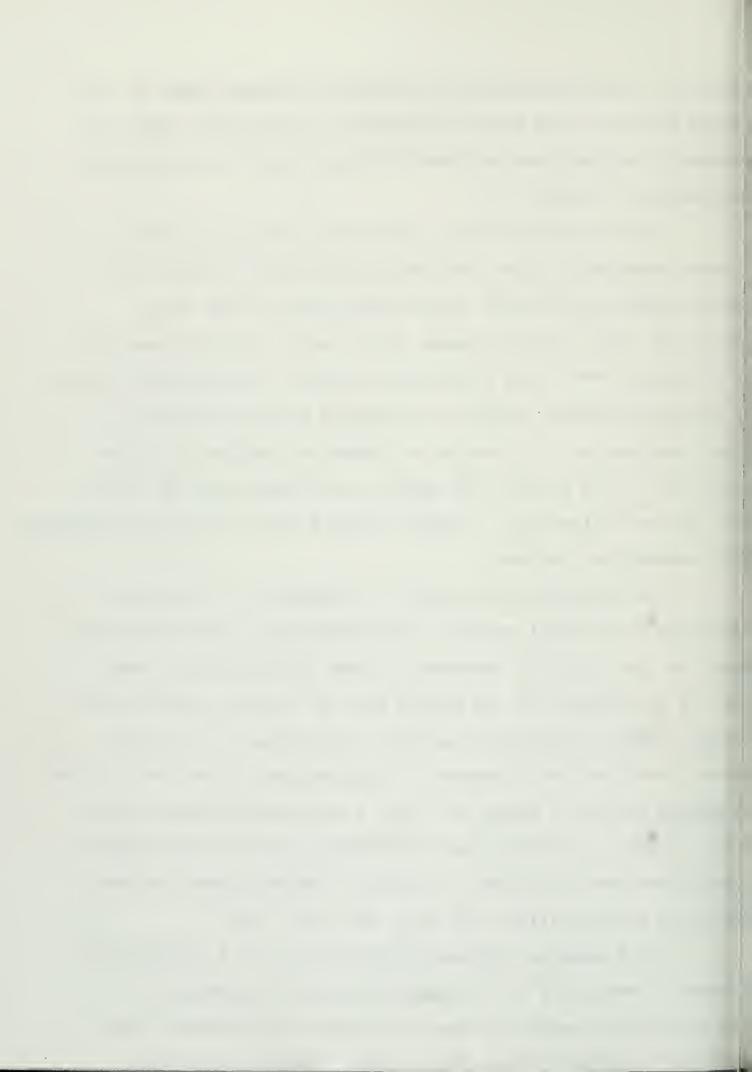
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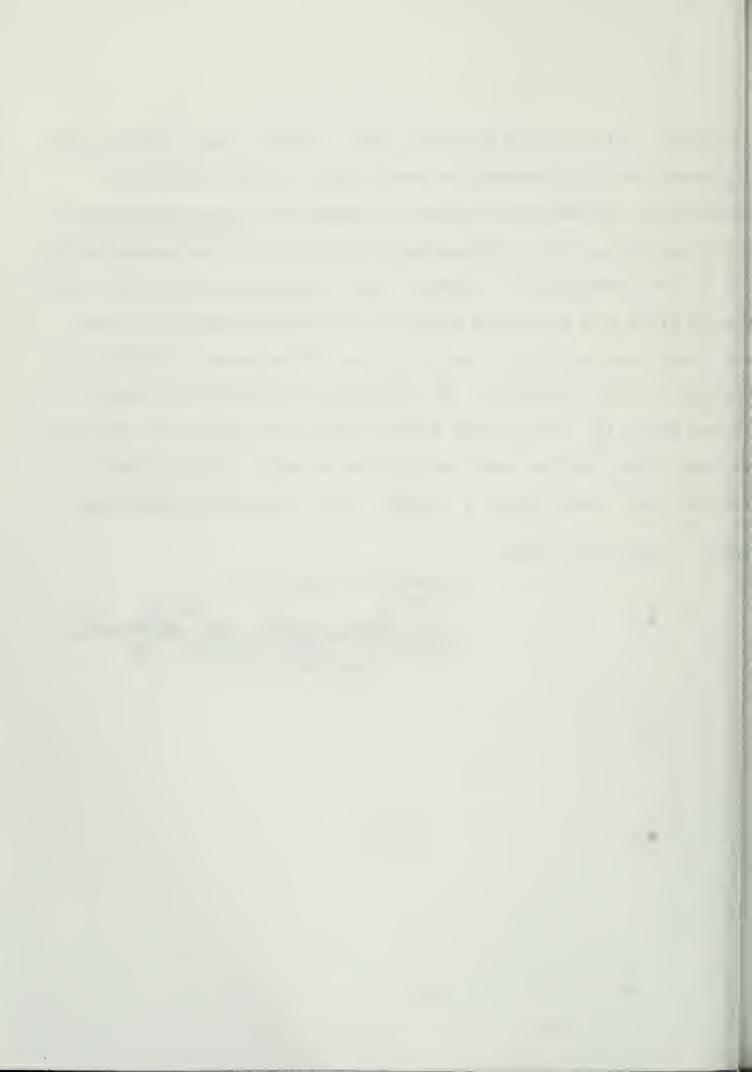
dicated in his Opening Brief (p. 46), all the cases cited by the spondent for this proposition were cases in which there was erwhelming independent evidence to support the unreasonableness the prediction, and, independent findings as to the unreasonabless of the predictions. Therefore the language in the cases cited mere dicta and even this dicta has not been repeated in a Fedal Court case since all the citations offered were to Orders or leases of the Commission. As discussed more fully in Reigel's ening Brief (p. 47) the one Federal Court case which the Hearingaminer cited for the same proposition actually upheld Reigel's sition that there can be a rational basis for such predictions.

TED: March 10, 1969.

Respectfully submitted,

Bernard I. Segal, Attorney for

Appellant Reigel



## UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

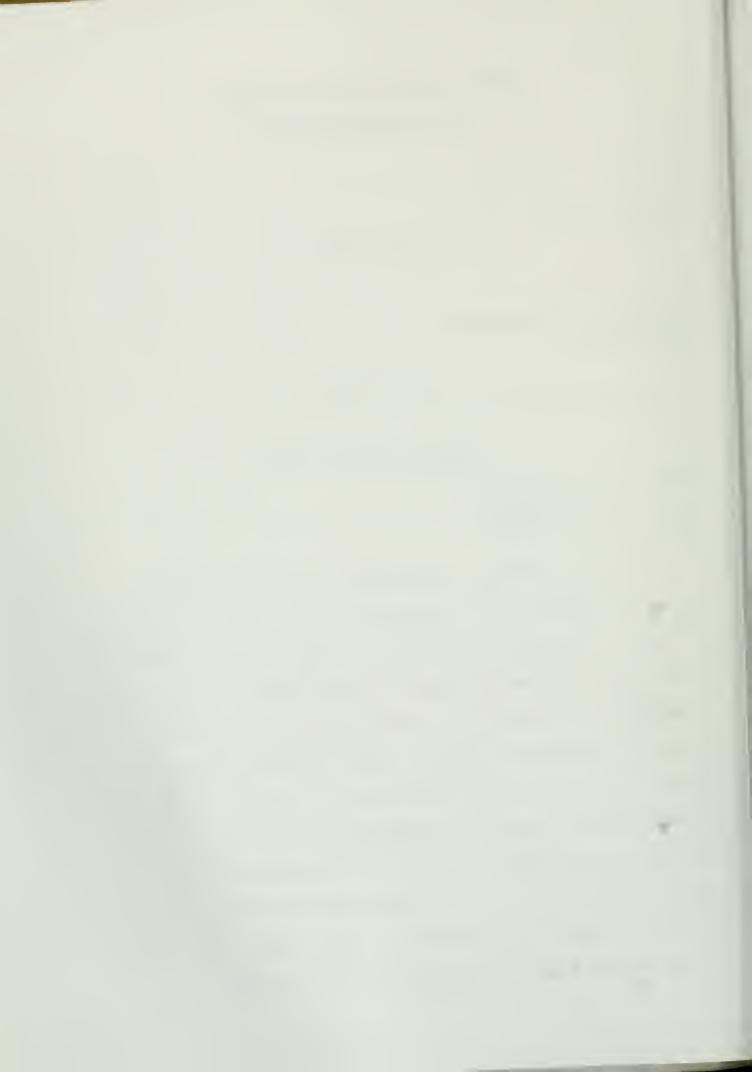
WILLIAM REIGEL,	Appellant,	) ) )
-vs-		No. 22459
SECURITIES AND EXCHANGE COMMISSION,		}
	Respondent	) ) _)

## AFFIDAVIT OF SERVICE

STATE OF CALIFORNIA)

OF LOS ANGELES)

and says that she is a secretary in the office of Bernard I. Segal, attorney at Law; that on March \_\_/\_\_, 1969, she served the attached Appellant's Reply Brief on the persons named below, by placing a copy thereof in an envelope properly addressed to them at their address appearing under their names, which addresses are the last addresses of said persons known to her, and the envelope containing sufficient government postage was deposited by her in the United States mail at 5670 Wilshire Boulevard, Los Angeles California 90036, for delivery by the United States Post Office Department as directed by said envelope.



Arthur Fred and Richard D. Caparella Attorneys for Division of Trading and Markets S.E.C. United States Courthouse Los Angeles, California 90012

Sander L. Johnson, Esq. 1800 Avenue of the Stars, Suite 415 Los Angeles, California 90067

Donald M. Feuerstein David Perber Securities and Exchange Commission Washington, D. C. 20549

DATED: March // , 1969

Elsie R. Stivers

Subscribed and sworn to before me this // day of March, 1969.

BERNAPD I. SEGAL

My Commission Expires Dec. 28, 1969

